TESTIMONY OF DANIEL P. TOKAJI
HOUSE ADMINISTRATION COMMITTEE
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Thank you for inviting me to appear before you today. My name is Daniel Tokaji, and I am an Assistant Professor at the Ohio State University's Moritz College of Law, as well as the Associate Director of the Election Law @ Moritz project. In my remarks today, I will focus on the election administration problems that arose in the course of Ohio's 2004 presidential election, especially those relating to implementation of the Help America Vote Act of 2002 ("HAVA"). I will then draw a few broader lessons from Ohio's experience during the 2004 election.

Background

Let me begin by laying out the near-miss that Ohio experienced. On the morning of November 3, 2004, President George W. Bush led Senator John Kerry by approximately 136,483 votes out of some 5.6 million cast in Ohio, the state upon which the presidential race ultimately turned. This margin was sufficient to overcome any legal challenges that might have arisen from uncounted provisional votes, ambiguously marked punch card ballots, and lengthy lines that may have discouraged many citizens from voting. But had President Bush's morning-after lead been half of what it was, a replay of the legal battles that culminated in *Bush v. Gore* – with the Buckeye State rather than the Sunshine State as the backdrop, Ken Blackwell playing the role of Katherine Harris, and provisional ballots joining punch-card ballots as the dominant props – would have been almost certain.

Despite the fact that there was no post-election meltdown this year, there remains significant room for improvement in the functioning of our election system. Yet there is one thing that I would like to make clear at the outset: The fact that this state and others experienced problems, and very significant ones, in 2004 does not mean that HAVA was a failure or that the law should be amended. To the contrary, I believe that HAVA's reforms have already made our election system better in important respects, and that other aspects of the law still to be implemented will improve the system further in years to come.

What is clear, however, is that any major change to the ecology of our elections system will initially cause some disruption in the short run – and the changes that occurred with HAVA were no exception. It follows that Congress should be extremely cautious in amending HAVA's requirements, at least until all of its core provisions have gone into effect. Put another way, HAVA should be given a chance to work before new federal requirements are imposed.

It is also clear that state election officials, in Ohio and elsewhere, could have done a much better job at implementing some of HAVA's existing requirements. In my opinion, the most important changes between now and 2008 should occur at the state rather than the federal level. Although the high level of attention to Ohio's election made the problems that occurred here particularly conspicuous, we were not the only state that had problems. I thus hope that election officials both throughout the country may learn from the mistakes that Ohio made in 2004.

Trouble Spots in Ohio's 2004 Election

Five major areas generated controversy during the most recent election cycle in Ohio: (1) voting technology, (2) provisional voting, (3) the handling of registration forms, (4) challenges to voter eligibility, and (5) long lines at the polling place. I will discuss each of these trouble spots in turn.

1. *Voting Technology.* The first problem was the state's failure to replace its outdated and unreliable voting equipment. Studies conducted in the wake of the 2000 election demonstrated significant problems in the machinery used to cast votes. Most notable among these is the punch-card ballot, which became so famous during the post-election controversy in Florida four years ago.

Approximately 72% of Ohio's voters continued to use the very same punch card voting equipment in 2004. My estimate is that between 48,000 and 64,000 Ohioans who voted in November 2004 did not have their votes counted due to the use of punch card voting equipment. These are votes that would have been counted, if better equipment had been in place.

The good news is that Ohio is something of an anomaly in this respect. Nationwide, the usage of punch cards declined significantly between 2000 and 2004, going from about 30% to 13% of registered voters. Those states that did eliminate punch cards saw a significant

improvement. One recent report by Charles Stewart of MIT estimates that one million votes were saved nationwide, due to improvements in voting equipment and other areas of election administration. This is one area in which HAVA really has worked.

After all the scrutiny that this equipment has received, and the significant improvements shown in places where voting equipment was replaced, one might well ask why Ohio failed to replace its equipment. Among the most significant features of HAVA was its provision of $325 million for the replacement of outdated voting equipment through Title I, and the implementation of standards for voting systems in Title III. States that received money under Title I of HAVA are required to replace their punch card and lever voting equipment. Ohio has received over $30 million under HAVA's punch-card buyout provision, and a total of over $130 million in HAVA funds overall.

For states accepting Title I money, HAVA set a deadline of 2004 for the replacement of punch card ballots and lever voting machines. But Ohio was among the 24 states that requested a waiver extending the replacement date until 2006. By this date, Ohio must replace its punch card equipment, or face the prospect of having to repay Title I funds it received. In addition, Title III of HAVA requires that every polling place have at least one electronic or other disability accessible voting unit in place by 2006. It is not clear, at this date, whether Ohio will meet either of these deadlines.

The replacement of punch card voting equipment has been complicated by a law enacted by the state legislature last year, requiring that electronic voting machines generate a contemporaneous paper record (more commonly known as the voter-verified paper audit trail or "VVPAT"). The enactment of this law, H.B. 262, made counties understandably nervous about replacing their punch cards with electronic voting machines, given the lack of certified equipment that meets this requirement and the uncertainty as to whether existing electronic equipment can be retrofitted to comply with it.

Compounding matters is the ongoing controversy over what type of equipment – electronic or optical scan – should be adopted to replace punch cards. Some counties have quite strongly opposed Secretary of State Blackwell's recent decision to require counties to adopt

optical scan equipment, instead favoring electronic voting machines. There is also some question about the Secretary of State's legal authority to make this decision, with Ohio's Attorney General having expressed the view that the Secretary of State was without power to force counties to choose optical scan equipment. The bottom line is that Ohio lags behind the rest of the country in terms of voting technology, and the future remains very much up in the air.

2. *Provisional Voting*. The implementation of provisional voting was arguably *the* story of the 2004 election. Title III of HAVA requires provisional ballots to for those eligible voters who, due to administrative error or for some other reason, appear at the polls on election day to find their names not on the official registration list.

Ohio saw significant controversy over provisional voting in 2004. The issue that garnered the most attention is whether provisional ballots may be cast or counted if the voter appears in the "wrong precinct." In at least seven states (Ohio, Michigan, Missouri, Colorado, Florida, North Carolina, and Arizona), this issue has resulted in litigation. In Ohio, Secretary of State Ken Blackwell issued a directive on September 2004, providing that voters would not be issued a provisional ballot, unless the pollworkers were able to confirm that the voter was eligible to vote at the precinct at which he or she appeared. A federal district court issued an injunction against this order, on the ground that Secretary of State Blackwell's directive failed to comply with the requirements of HAVA. This injunction was affirmed in part and reversed in part on appeal. The Sixth Circuit upheld the district court's order, insofar as it found that the Secretary of State had not fully complied with HAVA by requiring pollworkers to determine "on the spot" whether a voter resided within the precinct and by denying those not determined to reside within the precinct a provisional ballot altogether. But the Sixth Circuit concluded that HAVA did not require provisional ballots to be counted if cast in the wrong precinct.

Although the "wrong precinct" issue received the most attention, it was one of a number of issues surrounding provisional voting that emerged in 2004. Among the others was the question of whether voters should be allowed to cast a provisional ballot, if they had requested but had not received or voted absentee ballots. This also led to litigation, with a federal court in Lucas County ordering that these voters must receive provisional ballots.

Finally, there is ongoing litigation over Ohio's lack of clear and uniform standards for determining which provisional votes should be counted. HAVA requires that provisional ballots be counted, if the voters is determined "eligible under state law" to vote. Unfortunately, the Ohio legislature failed to enact any legislation prescribing the standards and procedures according to which such eligibility determinations should be made. Just four days before the election, Secretary of State Blackwell issued a two-page directive providing some very general guidance on the counting of provisional ballots. A case now pending in federal district court challenges this directive as overly vague, in violation of the Supreme Court's interpretation of the Equal Protection Clause in *Bush v. Gore*.

Whether or not one agrees with this legal claim, it is very clear that the State of Ohio needs to do better, in terms of providing specific and uniform standards for the counting of provisional ballots. If possible, these standards should be set by the legislature, rather than issued through ad hoc administrative directives – particularly ones that come just weeks or even days before the election. State legislation will enhance public confidence that the rules regarding provisional voting are the product of a reasoned debate and bipartisan consensus, rather than last-minute orders designed to favor one side or the other.

3. *The Handling of Registration Forms*. In the weeks leading up to November 2, several issues arose relating to the handling of registration forms. Among the issues was what to do with registration forms in which boxes had been left unchecked, or in which certain identifying information had been omitted. But the most intense controversy concerned Secretary of State Blackwell's September 2004 directive requiring that Ohio registration forms be printed on "white, uncoated paper of not less than 80 lb. text weight" (i.e., the heavy stock paper). Under this directive, forms on lesser paper weight were to be considered mere *applications* for a registration form, rather than a valid voter registration.

Although HAVA is silent on the question of the paper-weight of registration forms, voting rights advocates argued that the directive violated the Voting Rights Act, which requires that "[n]o person acting under color of law" may deny a person the right to vote "because of an error or omission on any . . . paper relating to any . . . registration . . . if such error or omission is

not material in determining whether such individual is qualified under State law to vote in such election." Some local election officials stated their intent to accept registration forms regardless of the paper weight on which they were printed, despite Blackwell's directive.

In the face of these objections, Secretary Blackwell's office backed down and, in late September, announced that registration forms on lighter-weight paper should still be processed. Still unknown is whether any registration forms were left unprocessed in reliance on Blackwell's original directive, and whether any voters were discouraged from voting by the initial rejection of their registration forms on this ground.

4. *Challenges to Voter Eligibility*. Another major issue that emerged in the weeks preceding the 2004 general election was the challenge process for questioning voter eligibility. Many people, particularly in communities of color, saw these challenges as part of a concerted strategy of voter intimidation. Some were also concerned that these challenges would be used to tie up polling places, particularly in heavily populated urban areas.

In Ohio, civil rights advocates and the Democratic Party went to court to challenge the challenges. A federal district court issued an injunction barring pre-election challenges of some 23,000 voters. In addition, there were four separate lawsuits concerning challenges to voter eligibility on election day. These cases produced a dizzying series of court orders and appellate proceedings, leading up to and even extending into election day. Four different trial judges issued orders limiting the challenges, yet each of these court orders was reversed on appeal – one of them on the afternoon of November 2, election day.

There was an undeniably partisan dimension to much of the disagreement over challenges to voter eligibility, with Republicans asserting the need to prevent voter fraud and Democrats generally urging limitations on challengers to ensure access. One thing on which there should be agreement on both sides, however, is that there is a pressing need for states to reexamine their challenge laws. A number of states, including Ohio, have statutes that are so broadly written that they could conceivably be used to challenge voters without good cause. While it is clearly important to discourage fraud, it is also important to clearly specify the standards and procedures

for making challenges, to ensure an orderly process that will not tie up polling places or consume the time of already overburdened local election officials and poll workers.

5. *Long Lines at the Polling Place*. Many Ohio voters waited for hours on or before November 2, 2004 in order to exercise their right to vote. The problems appear to have been particularly acute in some urban precincts here in Franklin County, where voters reported waiting for up to four or five hours. And at one polling place near Kenyon College in Knox County, Ohio, voters waited as long as ten hours. These lines posed a special difficulty for working people who could not be away from their jobs for that long, and for parents of younger children. It will probably never be known how many people were discouraged from voting, either because they arrived at the polling place to find lines stretching around the block or because they heard about how bad the lines were and thus never went to the polls in the first place.

On the day of the election, a lawsuit was brought on behalf of voters in Franklin and Knox counties seeking relief from the long lines. That evening, a federal district judge issued a temporary restraining order requiring that voters waiting in line be provided with "paper ballots or another mechanism to provide an adequate opportunity to vote," and directing that polls be kept open waiting in line. Despite the requirement to provide paper ballots to voters waiting in line, some voters in these counties waited in line for several hours after the polls closed before casting their vote.

There is reason for hoping that some of the not-yet-implemented requirements of HAVA will result in improvements. Although HAVA did not directly address the problem of long lines at the polling place, its authorization of funds for the replacement of outdated voting equipment may help address this concern. The failure to move forward with the planned purchase of new voting technology in time for the 2004 election was likely a contributing factor in the long lines that some Ohio voters experienced on election day. In many precincts, there were more than 200 voters for every machine, a ratio that would not allow voters to complete the process during the polling day. The bottom line is that we need to have more machines in place by 2004.

Preliminary Lessons from the 2004 Election

I close with three preliminary lessons drawn from Ohio's experience during the 2004 election.

Lesson 1: *States should set clear standards well in advance of election day, preferably through legislation rather than administrative directive.*

Truly speaking, we have not a single election system in this country nor even 50, but roughly 13,000 election systems – the approximate number of local entities with responsibility for the conduct of elections. Perhaps the most important lesson to emerge from both the 2000 and 2004 elections is the need for each state to provide specific and uniform guidance to its local jurisdictions, to ensure some semblance of consistency among counties. Seven justices of the Supreme Court expressed the need for such clear and uniform rules in the *Bush v. Gore* decision, as it relates to the conduct of manual recounts. Whether or not one agrees with the holding in this case, such rules are undeniably important for purposes of promoting consistent and equal treatment of voters across counties within a state.

In the area of provisional voting, for example, there ought to be consistent procedures and standards for determining voter eligibility across the state. It does not appear that this occurred in 2004. While 77.9% of provisional ballots were counted overall, the percentage of provisional votes counted varied dramatically among Ohio counties, from a low of 60.5% to a high of 98.5%. Such discrepancies in the percentage of provisional ballots counted tend to support an equal protection claim under *Bush v. Gore*, by suggesting that there is an unconstitutional lack of uniformity among counties

It is equally vital that the rules governing the administration of elections be transparent. Regrettably, transparency has been an area in which the Ohio Secretary of State's office has been sorely lacking. That office does not even post its directives to the counties governing the administration of elections on its website, even though these directives are obviously matters of public interest. In the controversy over whether voters who had requested an absentee ballot should be allowed to vote provisionally, the Secretary of State's office guidance came in the form of a private email just days before the election. And in some cases, such as the standards for counting provisional votes, it was not until shortly before the election that the directive was

actually made public. This can only lend the appearance that the election is being run according to secret (or at least semi-secret) rules. It is absolutely vital that the rules of the game be made public and be made available to all citizens well in advance of elections.

While the Secretary of State's office bears some responsibility in this area, the state legislature should also shoulder some blame. For example, in the area of provisional voting, the legislature should have enacted rules governing the process for counting provisional ballots after HAVA's enactment. This might well have avoided some of the litigation that transpired. Enacting legislation to set clear rules will, moreover, help prevent the public perception that ad hoc rules are being created by partisan election officials, to benefit their own party or preferred candidate. Whether or not these perceptions are accurate, they can only fuel public distrust of the process by which our elections are conducted.

Lesson 2: *The Election Assistance Commission has a vital role to play in the ongoing process of election reform.*

Congress' decision to create the Election Assistance Commission to assist with these and other issues was a wise one. Unfortunately, the EAC got off to a slow start due to the delay in appointing the four commissioners and to a shortage of funds. However, the Commission is now engaged in some very important work. It promulgated best practices for the implementation of different voting technologies and is presently at work on the HAVA-required improvements to the testing and certification of voting equipment. These remains a great deal of research that needs to be done in such areas as the usability and accessibility of voting technology, the implementation or provisional voting, methods of registering voters, and means by which to discourage fraud. Moreover, state and local election administrators are sorely in need of guidance on how to implement the provisions of HAVA.

The EAC's ongoing work is clearly essential to the success of HAVA. I would therefore urge that the EAC be given the funding it needs to continue its vital work.

3. Lesson 3: *Precipitous federal legislation should be avoided at least until HAVA's voting systems and registration requirements are fully implemented.*

If the 2004 election should teach us anything, it is that election reform is a process, not a destination. That process is not complete now, nor will it likely be complete in 2006 or even 2008. To the contrary, much of the most important work still remains to be done. In Ohio and other states, this means replacing present voting equipment with technology that is more reliable and accessible to people with disabilities. It also means finishing the massive task of implementing the statewide registration databases required by Title III, which must be in place by 2006. Many states implemented provisional voting for the first time in 2004 and will have to refine their process in response to problems that occurred in this election cycle. Even states like Ohio, which had some type of provisional voting in place before 2004 – although a much more limited one that is now required by HAVA – have considerable work to do in refining and improving their process.

There is reason to be optimistic that these ongoing changes will serve the goals of expanding access while promoting integrity, particularly if the EAC is given the resources it needs to provide assistance to the state and local entities that are principally responsible for implementing HAVA's mandates. It is my recommendation, however, that Congress be extremely cautious in enacting new legislation before HAVA is fully implemented. We should give HAVA's key provisions a chance to work and then measure their performance objectively, before rushing to enact new federal legislation.

A case in point is the proposal to require a contemporaneous paper record, or "voter verified paper audit trail" ("VVPAT") for electronic voting technology. While there are certainly legitimate concerns regarding the possibility of fraud and error with electronic voting, it is a mistake to equate paper with security or to mandate any particular technological fix until that fix has proven workable, effective, and superior to other alternatives. That is particularly true, given that the EAC and associated bodies are still in the process of making improvements to testing and certification procedures as prescribed by HAVA. States should be free to experiment with the VVPAT, as Nevada did in the most recent election. This state's experience is worthy of careful examination. For example, did voters actually check the paper records? Should all or some significant percentage of the paper records actually be recounted in every election to check

the accuracy of the electronic county? What happens in the event of paper jams? Are disabled and non-English speaking voters adequately accommodated? Is the voter's privacy protected? How much will it cost, not only to purchase this technology but to administer it properly on an ongoing basis?

These and other questions ought to be asked and answered before new federal requirements in the area of voting technology are enacted. One of the great advantages provided by our federalist system in general, and our decentralized system of elections in particular, is that it allows different jurisdictions to experiment. To mandate any particular technological fix, let alone one that has yet to be proven workable and effective, would not only short-circuit this process but would stifle innovation by requiring a particular device that may not turn out to be the best one – or even a satisfactory one. In fact, the headaches that Ohio is now experiencing in trying to conform to its VVPAT statute enacted last year demonstrate the dangers of legislating specific requirements that have not yet proven workable.

These thoughts one the VVPAT are just one example of a broader point: that Congress should be very reluctant to impose new federal requirements until HAVA is fully implemented. State and local entities should instead be given some breathing room that will allow them to comply with HAVA's key provisions, with guidance from the EAC. That is the approach that you most wisely took when you enacted HAVA more than two years ago, and I would urge you to stay that course today.

Thank you for your consideration.